STATE OF MICHIGAN

COURT OF APPEALS

DOROTHY RYNER,

Plaintiff-Appellant,

v

CITY OF HAMTRAMCK,

Defendant-Appellee,

and

LOUIS H. SCHIMMEL,

Defendant.

UNPUBLISHED
November 13, 2003

No. 241473
Wayne Circuit Court
LC No. 01-129211-CK

Before: Whitbeck, C.J., and Zahra and Donofrio, JJ.

PER CURIAM.

Plaintiff Dorothy Ryner appeals as of right the trial court's grant of summary disposition in favor of defendant City of Hamtramck. Ryner claimed that the city's refusal to give her severance pay under a policy that was rescinded after she announced her retirement but before she actually retired constituted breach of contract, unjust enrichment, and retaliation for protected political activity. We conclude that Ryner was not entitled to severance pay under the rescinded policy because it was conditioned on prior approval by the city council. We also conclude that Ryner presented insufficient evidence to create a genuine issue of fact respecting her retaliation claim. Therefore, we affirm.

I. Basic Facts And Procedural History

Ryner began working for the City of Hamtramck on September 1, 1984, and eventually rose to the position of deputy treasurer. This position was designated as "non-elected Class A." In 1997, to remedy the fact that non-elected Class A employees were being paid less than some of the union employees they supervised, the City Council passed the following resolution:

> Effective January 1, 1997, Non-elected Class A Employees who separate from employment (1) voluntarily, (2) as a result of death or disability, or (3) otherwise in the absence of cause shall receive upon said separation, at the request of the appointing or contracting party and upon motion and approval of the City Council, a severance bonus cash payment . . ..

The severance bonus cash payment varied according to the number of years of service.

Ryner initially intended to retire in late 1999, but newly elected city treasurer Michael Wilk persuaded her to stay to help effect a smooth transition. On October 6, 2000, Ryner wrote a letter to city treasurer Wilk informing him that she planned to retire on May 31, 2001. Because Ryner was aware that the city council planned to rescind the resolution that provided for severance pay, her letter included a formal request that treasurer Wilk and city controller Richard Jones calculate her severance compensation and arrange for it to be paid. The letter indicated that Ryner had discussed this plan with controller Jones, who told Ryner that he planned to recommend rescinding the resolution only after Ryner, as the last long-serving employee covered by the resolution, received her severance pay. According to Ryner, in early October, controller Jones urged her to stay on because her assistance was still needed.

On October 17, 2000, the city council rescinded the resolution providing for severance pay. Before Ryner's anticipated retirement date, her employment was terminated on December 9, 2000 when her position was eliminated by emergency financial manager Louis Schimmel. At her termination, Ryner sought payment of sixteen weeks' severance pay under the rescinded resolution, five weeks' vacation pay, and longevity pay of twenty dollars for each year of service from city controller William Barnett. Controller Barnett, however, refused to authorize payment, and when Ryner repeatedly asked for an explanation, Barnett's only response was, "you better hire a lawyer."

Ryner filed a three-count complaint in August 2001 against the city and emergency financial manager Schimmel, alleging that their failure to pay her severance, longevity, and vacation pay constituted a breach of contract, unjust enrichment,[1] and retaliation for her vocal opposition to Mayor Gary Zych. The trial court later dismissed emergency financial manager Schimmel with prejudice pursuant to Ryner's stipulation. Ryner did not contest the propriety of her termination.

After a motion hearing, the trial court granted the city's motion for summary disposition on all three claims.[2] Regarding the breach of contract claim, the trial court explained that the severance policy

> was a gratuity extended by the Council. It was—it's like an offer for a contract. On the happening of an event, you will get X dollars. If you paint my house, I will pay you five thousand dollars. If you don't paint the house, then the offer isn't there.
>
> This gratuity was dependent on separation from service which never occurred. She didn't take advantage of the gratuity. The Council was not obliged to pass this law, they were not obliged to keep in effect. She's not entitled to it.

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[1] Ryner does not discuss this issue in her appellate brief, and therefore we deem it abandoned. See *Gross v General Motors Corp*, 448 Mich 147, 162; 528 NW2d 707 (1995).

[2] The trial court did not address Ryner's claims for longevity and severance pay.

The trial court rejected the suggestion that the situation was comparable to one in which the hypothetical painter had completed two-thirds of the house and was entitled to payment, because in that case, "the offeree would have performed two thirds of the required event. The event never took place in this instance."

The trial court also granted summary disposition of Ryner's retaliation claim, which was based on the circumstantial evidence that two mayoral appointees, Frederick Zajdel and Robert Cwiertniewicz, were given their severance pay while Ryner, who had actively opposed Zych's mayoral campaign, was denied hers. The city's counsel responded that Cwiertniewicz resigned before the resolution was rescinded, and that Zajdel received a severance package as part of a separate agreement that was unrelated to the resolution.

II. Breach Of Contract

A. Standard Of Review

We review de novo the trial court's decision on a motion for summary disposition[3] as well as issues concerning contractual[4] and statutory[5] interpretation.

B. The Severance Pay Resolution

Ryner argues that an enforceable contract was formed when she continued working in reliance on the promise of severance benefits, and that rescinding those benefits, which she maintains she had already earned by her continued work, breached that contract. Ryner bases her argument in part on a line of cases holding that severance pay provisions are not mere gratuities, but are offers that become unilateral contracts when employees accept and provide consideration by continuing to work.[6] Ryner also relies on a passage from Corbin on Contracts for the proposition that withdrawing an offer of a bonus, pension, or severance pay after a substantial part of the service has been rendered is a breach of contract.[7]

We agree with the general proposition that adoption of a policy entitling employees to severance pay can constitute an offer that can be accepted by performance and that a breach of contract could result if the policy were not honored once an employee continued working in reliance on the policy.[8] Accordingly, we reject the trial court's conclusion that severance pay

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[3] *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

[4] *Archambo v Lawyers Title Ins Corp*, 466 Mich 402, 408; 646 NW2d 170 (2002).

[5] *Oakland Co Bd of Rd Comm'rs v Michigan Property & Casualty Guaranty Ass'n*, 456 Mich 590, 610; 575 NW2d 751 (1998).

[6] See *Cain v Allen Electric & Equipment Co*, 346 Mich 568, 579-580; 78 NW2d 296 (1956); *Gaydos v White Motor Corp*, 54 Mich App 143, 148; 220 NW2d 697 (1974); *Clarke v Brunswick Corp*, 48 Mich App 667; 211 NW2d 101 (1973).

[7] See 2 Corbin on Contracts, § 6.2, 214-217.

[8] See *Cain*, *supra* at 579-580; *Gaydos*, *supra* at 148.

policies are always gratuitous in nature and that they may be revoked without resulting in a breach of contract.

However, on the facts of this case, we conclude that the trial court nonetheless reached the correct result. Our reading of the city's severance pay resolution indicates that the employees covered by the resolution were not *automatically* entitled to severance pay if they continued working after its adoption. Rather, the resolution states that receipt of severance pay was conditioned on approval by the city council. Thus, the city's severance pay policy is distinguishable from those in *Cain* and *Gaydos*, which contained no language indicating that the employees' entitlement to severance pay was conditioned on the employer's approval.[9] For this reason, we conclude that Ryner's severance pay was not vested at the time her position was eliminated and the city's rescinding of the policy did not constitute a breach of contract.[10]

Ryner argues that the requirement of obtaining approval from the city council was not intended as a condition precedent to the payment of severance pay, but was only a matter of procedure. However, to construe the phrase "upon motion and approval of the City Council" in this manner ignores the fact that, by including the phrase in the resolution, the council explicitly reserved the power to approve—and, it follows, to disapprove—a request for severance pay under the policy. To interpret the resolution as Ryner suggests would render this phrase meaningless and we therefore decline to do so.[11]

We recognize that the outcome is regrettably harsh given the underlying facts of the case. However, while the city's treatment of Ryner with respect to her severance pay may be characterized as unfair, it simply does not constitute a breach of contract. Accordingly, the trial court did not err in granting the city's motion for summary disposition.

III. Retaliation

A. Standard Of Review

As noted, this Court reviews de novo the trial court's decision on a motion for summary disposition.[12]

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[9] See *Cain*, *supra* at 570; *Gaydos*, *supra* at 146. This Court's discussion of the severance pay policy in *Clarke* did not include the text of the policy itself.

[10] We acknowledge Ryner's observation that the city did not raise this argument at the motion hearing. However, because the issue is one of law for which the facts necessary to resolve it have been presented, we may nonetheless address it. See *Steward v Panek*, 251 Mich App 546, 554; 652 NW2d 232 (2002).

[11] See *Altman v Meridian Twp*, 439 Mich 623, 635; 487 NW2d 155 (1992).

[12] *Maiden*, *supra* at 118.

B. Ryner's Circumstantial Evidence

Ryner argues that the trial court erred in granting the city's motion for summary disposition of her retaliation claim. To successfully oppose a motion under MCR 2.116(C)(10), the nonmoving party may not rely on mere allegations or denials, but must set forth evidence of specific facts showing that a genuine factual issue exists.[13] In evaluating the motion, the trial court must consider the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, in the light most favorable to the party opposing the motion.[14] The trial court may only consider "the substantively admissible evidence actually proffered in opposition to the motion," and may not deny the motion on "the mere possibility that the claim might be supported by evidence produced at trial."[15] If the proffered evidence fails to establish a genuine issue of material fact, the moving party is entitled to judgment as a matter of law.[16]

To establish a prima facie case of retaliation, Ryner was required to show that there was a causal connection between her protected political activity and denial of her severance benefits.[17] Ryner acknowledged that there was no direct evidence of retaliation, and that the only evidence to support her claim was that two of Mayor Zych's appointees, Frederick Zajdel and Robert Cwiertniewicz, were given severance pay while Ryner, who had actively opposed Zych's mayoral campaign, was denied it. However, Ryner's own documentation indicates that Cwiertniewicz, unlike Ryner, resigned *before* the resolution was rescinded. Although Ryner provided documentation that Zajdel received severance pay despite having resigned after the resolution was rescinded, the amount he was paid exceeds what he would have been entitled to under the resolution. This supports the city's contention that Zajdel was paid as part of a separate agreement that was unrelated to the rescinded resolution. The fact that one employee received a severance package for unspecified reasons is insufficient circumstantial evidence to raise an inference that Ryner was not given a severance package in retaliation for her political activities. Therefore, we conclude that the trial court did not err in granting the city's motion for summary disposition of Ryner's retaliation claim.

Affirmed.

/s/ William C. Whitbeck
/s/ Pat M. Donofrio

I concur in result only.

/s/ Brian K. Zahra

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[13] *Smith v Globe Life Ins Co*, 460 Mich 446; 597 NW2d 28 (1999).

[14] MCR 2.116(G)(5); *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

[15] *Maiden*, *supra* at 121.

[16] MCR 2.116(C)(10), (G)(4); *Quinto*, *supra* at 362.

[17] See *DeFlaviis v Lord & Taylor, Inc,* 223 Mich App 432, 436; 566 NW2d 661 (1997).